85 - 1459

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES H. POWELL,

Appellant

v.

RUTH ANN POWELL,

Appellee

ON APPEAL FROM THE COURT OF APPEALS OF TEXAS FOR THE TENTH SUPREME JUDICIAL DISTRICT

REPLY TO MOTION TO DISMISS OR AFFIRM

JULIANNE MAY YOUNG
3000 Briarcrest Drive,
Suite 602
Bryan, Texas 77802
(409) 776-9551

Attorney for Appellant

REPLY TO MOTION TO DISMISS OR AFFIRM

I. This Court has jurisdiction on the same grounds as it did in McCarty.

Appellee severely mischaracterizes this suit as a divorce proceeding. The parties were divorced in 1965. The only issue presented herein is whether Appellee owns a joint tenancy right in property by virtue of the Uniformed Services Former Spouses Production Act (FSPA). The parties' 1963 divorce is the source from which the tenancy in common interest, if any, must be derived.

A tenancy in common interest may arise from a number of circumstances, the most common of which is by inheritance of a joint interest in property. Some of the community property states, of which Texas is one, maintain that a tenancy in common interest can arise when community property is held during the marriage, but is not specifically divided in the divorce decree. If the property is not divided upon divorce it is held by the parties as tenants in common and is merely divided

under the general laws pertaining to partition suits. §9 Tex. Jur. 3d Family Law 379. Before the parties can acquire a tenancy in common interest, the property must be properly characterized as "community" property during the marriage. As a practical matter this characterization is never made until there is a death of one of the spouses or the parties are divorced. The interest in the property is determined under the law as it exists at the time of death or divorce. Further, the rights to the property must have become vested during marriage. The property in question, military retirement pay, has been repeatedly held to be a vested property right. See Taggart v. Taggart, 552 S.W.2d 442 (Tex. 1977).

The law in effect at the time the tenancy in common interest is claimed to have arisen in 1963 was not the FSPA, but the statutory scheme explored in McCarty. It is for this reason that Appellant has brought this case to the Supreme Court under the same jurisdictional grounds as McCarty. The 1963 community property laws in Texas were in conflict with and in-

vaded substantial federal interests under the 1963 federal law governing retirement pay. In other words, no community property interest could have arisen in 1963 because federal law preempted the state community property laws. Consequently no tenancy in common interest could have arisen.

For further grounds Appellant would show that the state law concerning the percentage of interest is repugnant to and a clear violation of the Fifth and Fourteenth Amendment guarantees of due process. If this Court were to find that Congress can retroactively modify the federal law in effect in 1963, then it is necessary to look at the state law to determine the percentage of interest held by the parties as tenants in common. Again, Appellee cannot own, as a joint tenant, any greater interest than she owned during the marriage. This interest, if any is determined under the laws in effect at the time of divorce. Cameron was not decided until 1982 and 3.63 (b) (1) of the Texas Family Code was not effective until September 1, 1981. Under the

lower courts holding a party could wait twenty years or more, until the law becomes more favorable, then claim a greater property interest than such party would have had at the time the interest arose. Surely this has never been the law in Texas or anywhere else, but either a dismissal or affirmation of the lower court's decision will allow it to become the law.

II. The Questions Presented are Substantial

In 1981, a court of competent jurisdiction held that Appellee had no partitionable property right. Powell v. Powell, 620 S.W.2d 253 (Tex.App. 1981, error ref., n.r.e.).

Appellee argues and the lower held that the 1981 judgment between these parties is not res judicata of the issues then presented, facts as they then appeared and legislation then existing. The issue "then presented" was whether or not the Powells held property, military retirement benefits past and future, as tenants in common. No new issues are presented in this case. The "facts" as they "then appeared" are identical -- the only new fact

created by the FSPA is the fact that a new law was enacted.

Appellee argues that had she waited to file suit until after the enactment of the FSPA, res judicata would not be presented. This is no justification for simply ignoring the prior case. Our entire judicial system would fail if final judgments could be ignored every time the law changed to favor a particular litigant. Furthermore, there is nothing in the FSPA which addresses the setting aside of a prior final judgment. Cox v. Cox, 223 CalRptr. 655 (Cal.App. 4 Dist., 1986).

To contend, as Appellee has done, that a new law applied to a controversy already settled between the parties is not retroactive, is absurd. Id. All of the cases cited by Appellee as supportive of this result, including Jett v. Jett, 449 So.2d 557 (La.Ct.App. 1984), writ den. 458 So. 2d 473 (La. 1984), cert. den. 105 S.Ct. 2115 (1985), are divorce cases which prospectively award a portion of military retirement pay. Appellant agrees that the FSPA was intended to nullify the effects of McCarty, not

McCarty. Further, the effects are only nullified for persons divorcing after or for persons whose decrees had not become final as of the effective date of the Act.

Appellee further argues that McCarty has been held not to be retroactively applicable. The basis for those Texas decisions, involved instances where prior judgments awarding military retirement pay had already become final. In Segrest v. Segrest, 649 S.W.2d 610 (Tex. 1983), the Texas Supreme Court correctly followed this Court's decision in Federated Department Stores v. Moitie, 452 U.S. 394 (1981), holding that a law should not be retroactively applied to disturb final judgments, even if such judgments were erroneous. The 1981 judgment in this case was based upon the correct law. Yet, Appellee argues that the FSPA should be retroactively applied as if McCarty were never decided. Surely the FSPA is not interpreted by this Court to violate the Separation of Powers doctrine!

Appellee states that "Appellant misses [the] fundamental thrust of the USFSPA", to devide retirement

pay according to state law. The state law is and always has been that this is a suit to partition a tenancy in common interest. If the Act allows enforcement in accordance with state law, then the state law is and always has been that no tenancy in common right arises in property which could not have been awarded at the time of divorce. Further, the state law has never been that a final judgment may be ignored and held of no force and effect because the law has changed. See Houston Family Law Section article on interesting cases by David N. Gray discussing Powell v. Powell.

Finally, Appellee argues that a governmental pension is a public right in which there are no "vested rights". If Appellant's rights are not vested, then they were not subject to being divided as community property under Texas law and no tenancy in common rights could have arisen. See Busby v. Busby, 457 S.W. 2d 551 (Tex. 1970). Appellee cites in support of her proposition, Stouper v. Jones, 284 F2d 240 (D.C. Ct.App. 1960) and Costello v. United States, 587 F2d 424 (Ct.App.-9th Cir.,

1978), cert. den., 442 U.S. 929, 99 S.Ct. 2858, 61 L.Ed.2d. 296 (1979). The Jones case tested the constitutionality of the Civil Service Retirement Act amendments of 1956 on the basis that Appellant was being deprived of her pension without compensation. The amendments sought to avoid dual compensation under the federal retirement scheme and provided that the disability annuity payments could only be discontinued if the annuitant were restored to a level fairly comparable to her current rate of pay. Appellant's retirement pay will be taken and given to another private individual. There is nothing to replace what is being taken from him. Similar challenges have been made under the equal protection clause concerning the Dual Compensation Act, but such cases are likewise inapposite.

The second case, Costello, states that rights can only be prospectively altered. Appellant had already received over $24,446.00 in retirement pay prior to the effective date of the Former Spouse's Protection Act and the date of filing this suit, $11,245.22 of which has been

awarded to Appellee. Further if Costello and McCarty are correct that retirement pay is current pay for reduced continuing services, then under community property concepts, such pay would be current income and thus community property of the present marriage between Appellant and Mrs. Nancy Powell, his wife of 19 years. The holding in this case undeniably divests Appellant of his property rights established under federal law in 1965 and further compounds the due process deprivation by holding that a final judgment declaring this result is of no force and effect.

Should Appellee's Motion be granted, this Appellant, who served his country in time of war, will have learned that he cannot rely on the final judgment of a court, that Congress can retroactively change prior law, that a decision of this, the highest court, can be overruled by a lower court's interpretation of congressional intent and that neither the Constitution nor this Court will afford him protection from this grave injustice. Granted, Appellant will suffer should Appellee's

Motion be granted, but such suffering pales in the light of the irreparable damage to the law and the authority of this Court. Mrs. McCarty has again filed suit. Can neither Appellant nor Mr. McCarty or others similarly situated rely upon a decision of this Court? Should Appellee's Motion be granted, then the answer is, they cannot.

CONCLUSION

Appellant respectfully prays that this reply be considered in conjunction with his Appeal and alternate application for Writ of Certiorari and that Appellee's Motion to Dismiss or Affirm be accordingly denied.

Respectfully submitted

Julie May Young
3000 Briarcrest Dr., Suite 602
Bryan, Texas 77802
(409) 776-9551

ATTORNEY FOR APPELLANT